Wong Hua Seh v Ding Kuong Hiing

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-10 OF 2008(Q)
ALAUDDIN MOHD SHERIFF PCA, ARIFIN ZAKARIA CJ (MALAYA) AND ZULKEFLI FCJ
23 JANUARY 2009

Election — Petition — Allegation of corrupt practice — Promise of development in form of setting up of college — Whether legitimate form of campaigning — Whether promise constituted corrupt practice of bribery — Whether promise within ambit of words 'office', 'place' or 'employment' — Whether food provided with intention of influencing voters to vote for candidate — Whether offence of treating under s 8 of the Election Offences Act 1954 established — Election Offences Act 1954 ss 8, 10 & 32

Words and Phrases — 'office', 'place' or 'employment' — Election Offences Act 1954 s 10(b)

The appellant herein was appealing against the decision of the learned election judge who had dismissed the election petition. In the general election held on 8 March 2008, the appellant contested the election on the Democratic Action Party ticket and polled 10,537 votes. The respondent, who contested on the Barisan Nasional ticket, won the election by a narrow margin of 51 votes. The election petition was filed by the appellant on the ground that the respondent, his agent and Tan Sri Dato' Paduka Ting Pek King ('TPK') had committed various instances of corrupt practices of bribery or of treating as understood under ss 10(b), 10(c) and 8 of the Election Offences Act 1954 ('the Act') and therefore the election of the respondent should be declared void under s 32(c). It was contended that TPK had made promises to the electors of Bintangor that as long as 'Ding' be elected as a member of the parliamentary constituency of Sarikei, he would build Rahman College in Bintangor. The learned election judge held that since what was promised by TPK was only a legitimate promise of a form of development for Bintangor, there was nothing corrupt about it and further, there was absolutely no evidence that any voter was involved in such bargaining. On the allegation that TPK or his friends had paid for food for 500 people, the learned election judge held that to prove treating under s 8, the appellant was required to establish beyond reasonable doubt that the food was provided with the intention of influencing the voters to vote for a

candidate or not to vote a candidate at an election, an element which was lacking in this case. Against the said decision, the appellant appealed to this court.

Held, dismissing the appeal with costs:

(1) In any election, a candidate was bound to make promises to bring development to the constituency in which he was standing this alone. However, it could not constitute 'bribery' as used in the Act as otherwise the whole process of election will be meaningless. On the facts, the promise to build the Rahman College was a legitimate promise in the election and that by itself could not constitute any form of bribery under the Act (see paras 14 & 15).

(2) However, the promise to construct the college could not by any stretch of imagination be construed as a promise for an 'office', 'place' or 'employment' as appearing in s 10(b). In order to constitute such a bargain there must be present a promise from the appellant to build Rahman College and a counter promise by the voters to vote for the appellant. Here, there was no evidence of a counter promise by the voters (see para 13).

(3) To prove treating under s 8, the appellant needed to establish beyond reasonable doubt that food was provided with the intention of influencing the voters to vote for or not to vote a candidate at an election. There was no such evidence before the court. Therefore, the learned election judge had rightly ruled that the appellant failed to establish the offence of treating under s 8 (see paras 18–20).

[Bahasa Malaysia summary

Perayu di dalam kes ini merayu terhadap keputusan hakim pilihan raya yang bijaksana yang telah menolak petisyen pilihan raya. Di dalam pilihan raya umum yang telah diadakan pada 8 Mac 2008, perayu yang bertanding dalam pilihan raya atas tiket Parti Tindakan Demokratik dan mendapat sebanyak 10,537 undian. Responden, yang bertanding atas tiket Barisan Nasional, telah memenangi pilihan raya dengan perbezaan margin yang sedikit iaitu 51 undian. Petisyen pilihan raya telah difailkan oleh perayu atas alasan bahawa responden, agennya dan Tan Sri Dato' Paduka Ting Pek King ('TPK') telah melakukan pelbagai amalan korup rasuah atau menjamu seperti mana yang difahami di bawah ss 10(b), 10(c) dan 8 Akta Kesalahan Pilihan Raya 1954 ('Akta') dan oleh itu pemilihan responden seharusnya diisytiharkan batal di bawah s 32(c). Adalah ditegaskan bahawa TPK telah berjanji kepada pengundi-pengundi Bintangor bahawa selama mana 'Ding' dipilih sebagai ahli parlimen kawasan Sarikei, beliau akan membina Kolej Rahman

di Bintangor. Hakim pilihan raya yang bijaksana memutuskan memandangkan apa yang dijanjikan oleh TPK hanya janji sah yang berbentuk pembangunan untuk Bintangor, tiada yang korup berkenaannya dan selanjutnya, tidak ada bukti langsung bahawa mana-mana pengundi terlibat di dalam tawaran tersebut. Atas dakwaan bahawa TPK atau rakannya telah membayar makanan untuk 500 orang, hakim pilihan raya yang bijaksana memutuskan bahawa untuk membuktikan menjamu di bawah s 8, perayu dikehendaki untuk membuktikannya melangkaui batas keraguan bahawa makanan yang disediakan dengan niat mempengaruhi pengundi-pengundi untuk mengundi atau tidak seseorang calon semasa pilihan raya, iaitu elemen yang tiada di dalam kes ini. Menentang keputusan tersebut, perayu merayu ke mahkamah ini.

Diputuskan, menolak rayuan dengan kos:

(1) Dalam mana-mana pilihan raya, seorang calon adalah terikat untuk membuat janji-janji bagi membawa pembangunan kepada kawasan pengundian di mana dia bertanding. Walau bagaimanapun, ia tidak boleh membentuk 'rasuah' seperti mana yang digunakan di dalam Akta kerana jika tidak keseluruhan proses pilihan raya menjadi tidak bermakna. Di atas fakta, janji untuk membina Kolej Rahman adalah janji yang sah di dalam pilihan raya dan secara sendirinya tidak membentuk rasuah di bawah Akta (lihat perenggan 14 & 15).

(2) Walau bagaimanapun, janji untuk membina sebuah kolej tidak dapat dijangkau oleh imaginasi untuk membentuk satu janji bagi 'jawatan', 'kedudukan' atau 'pekerjaan' seperti yang tertera di dalam s 10(b). Untuk membentuk tawaran tersebut, mestilah ada janji daripada perayu untuk membina Kolej Rahman dan janji balas oleh para pengundi untuk mengundi perayu. Di sini, tidak terdapat bukti bagi janji balas oleh para pengundi (lihat perenggan 13).

(3) Untuk membuktikan menjamu di bawah s 8, perayu perlu membuktikan secara melangkaui batas keraguan bahawa makanan yang disediakan dengan niat untuk mempengaruhi para pengundi untuk mengundi atau tidak seseorang calon semasa pilihan raya. Tiada bukti seperti itu di hadapan mahkamah. Oleh itu hakim pilihan raya yang bijaksana adalah benar apabila memutuskan bahawa perayu telah gagal untuk membuktikan kesalahan menjamu di bawah s 8 (lihat perenggan 18–20).]

Notes

For cases on application for allegation of corrupt practice, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1992–2000.

Cases referred to

Dhartipakar Madan Lal Agarwal v Shri Rajiv Gandhi AIR 1987 SC 1577, SC (refd)
Ghasi Ram v Dal Singh AIR 1968 SC 1191, SC (refd)
Harjit Singh Mann v S Umrao Singh & Ors AIR 1980 SC 701 (refd)
Maganlal Bagdi v Hari Vishnu Kamath (1958) 13 ELR 205 (refd)
S Mahar Singh v Umrao Singh AIR 1961 Punj 244 (refd)

Legislation referred to

Election Offences Act 1954 ss 8, 10(b), (c), 32(a), (c)
Representation of the People Act 1951 [India]

Appeal from: Election Petition No 26–01 of 2008 (High Court, Sibu).

Chong Siew Chiang (Alvin Yong Sze Lung with him) (Chong Brothers Advocates) for the appellant.
Henry Ling Kuong Meng (Ling & Wong) for the respondent.

Arifin Zakaria CJ (Malaya) (delivering judgment of the court):

BACKGROUND

[1] This is an appeal against the decision of the learned election judge sitting at the High Court in Sibu, Sarawak dismissing the election petition filed by the appellant (the petitioner in the High Court).

THE FACTS

[2] In the recent general election held on 8 March 2008 the appellant contested the election on the Democratic Action Party ('DAP') ticket and polled 10,537 votes. The respondent who contested on the Barisan Nasional ('BN') ticket won the election by a narrow margin of 51 votes. The election petition was filed by the appellant on the following grounds:

(a) the respondent or with his knowledge or consent, his agent and Tan Sri Dato' Paduka Ting Pek King ('TPK') had committed six instances of corrupt practice of bribery or of treating as understood under ss 10(b), 10(c) and 8 of the Election Offences Act 1954 ('Act') and therefore the election of the respondent should be declared void under s 32(c); and

(b) relying on the six instances, even if those acts were not committed by the respondent or by other persons with the knowledge of the respondent but because the general treating had so extensively prevailed in the election and so extensively committed by the respondent for the

purpose of procuring or promoting the election of the respondent, the election of the respondent should be declared void under s 32(a).

[3] Evidence was adduced in the court that at the various places and on different dates, TPK, person or agent of the respondent or with his knowledge or consent, made promises to the electors of Bintangor that as long as 'Ding' be elected as a member of the parliamentary constituency of P208 (Sarikei), he would build Rahman College in Bintangor. The promise was repeated by the respondent's agents at various places and dates during the election campaign.

[4] There are two issues before the learned election judge namely:

(a) whether TPK promised that if the respondent was elected TPK would build the college; and

(b) whether such a promise was an offence under the Act.

[5] For the first issue, the learned election judge held that:

(a) Going by the report, it meant that TPK had promised to build the college if the respondent wins the election. The petitioner had also relied on a photograph of the respondent taken by a reporter under which ran the words 'Vote Ding Kuong Hiing in exchange for Rahman College' but it was not stated by anyone as to whether those words were meant to convey that they were spoken by anyone or by TPK; and

(b) Based on the evidence before the court he was satisfied beyond any reasonable doubt that TPK did promise that if the respondent is elected TPK would build the college and the promise was made in the 25 February, 29 February and 2 March gatherings.

[6] As for the second issue, the learned election judge held that:

(a) To succeed under s 10(b), the petitioner must establish that the promise to build the college comes within the meaning of the term 'promises to procure or to endeavour to procure, any office, place or employment'. This in turn depends on the meaning of the terms 'office', 'place' or 'employment'. All those terms presuppose that the person offered such 'office', 'place' and 'employment' would benefit financially from occupying such positions. That being the case, the offer to build a college which brings no financial gain to a voter cannot amount to a promise to the voters or any of them an 'office' or 'place' or 'employment'. The petitioner's counsel did not argue or demonstrate to the court how the promise to build a college can amount to a promise to procure such an 'office' or 'place' or 'employment'. Therefore, the petitioner fails to establish a case under s 10(b);

(b) The voters must have been engaged in the negotiation regarding the building of the college and it must be shown that the voters have demanded for such a college resulting in TPK giving that promise to build the college in return for their votes. All that petitioner produced was evidence of the repeated promise and of what certain witnesses felt regarding the promise but what was needed was evidence of the bargaining which was lacking as there is absolutely no evidence that any voter was involved in such bargaining. The most the promise can amount to was a promise of development in the form of setting up the college in Bintangor which is a legitimate form of campaigning;

(c) The allegation of treating was confined to the 25 February luncheon gathering where evidence was led that TPK or his friends had paid for food for 500 people. Under s 8, it must be established that the food was given in order to influence the voters to vote for whom or whom not to vote. Learned counsel for the petitioner did not elaborate how the luncheon had reaped votes for the respondent which must be established. Therefore, the petitioner had also failed to establish the offence of treating under s 8; and

(d) Since what was promised by TPK is only a legitimate promise of a form of development for Bintangor, there is nothing corrupt about it and also there was no element of bargaining.

THE CONTENTIONS BEFORE THIS COURT

[7] In the memorandum of appeal filed before this court the appellant raised eight grounds of appeal. However at the hearing of the appeal, learned counsel for both parties agreed that this appeal is focused principally on the following two questions:

(i)

(a) is 'bargaining' an essential element in the offence of bribery;

(b) has the learned election judge rightly in fact and in law dealt with the issue of 'bargaining';

(c) irrespective of whether or not there is a bargain, does the promise to build Rahman College on the condition that the respondent was elected fall within the mischief of s 10(c) of the Act;

(d) whether a corrupt practice was committed in connection with the election by the candidate (respondent) or his agent (TPK) or with the consent of the respondent under s 32(c) and/or whether general bribery and/or general treating have so extensively prevailed that they may be reasonably supposed to have affected the result of the election under s 32(a) of the Act; and

(ii) whether the learned election judge erred in law and in fact in coming to his conclusion that the petitioner has failed to make out a case under s 32(c) and/or a case under s 32(a) of the Election Offences Act 1954 against the respondent.

[8] It is a firm finding by the learned election judge that TPK did promise that, if the respondent is elected TPK would build the college and the promise was made on the 25 February and 2 March gatherings. The issue is whether the promise constitutes a corrupt practice of bribery under s 10(b) and (c) of the Act. Section 10(b) of the Act is directed at a promise to procure or to endeavour to procure 'any office, place or employment' to or for any elector or voter or to any person on his behalf. The issue is whether the promise by TPK could come within the ambit of the words 'office', 'place' or 'employment'. Taking the plain dictionary meaning of these words we agree with the learned election judge that the answer to this question would be in the negative. This is simply because the promise to construct the college could not by any stretch of imagination be construed as a promise for an 'office', 'place' or 'employment' as appearing in s 10(b).

[9] The next question is whether the said promise would be caught by s 10(c) of the Act which reads:

> (c) every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, makes any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person in order to induce such person to procure or endeavour to procure the election of any person, or the vote of any elector or voter at any election.

[10] The appellant contended that the promise by TPK to build the college in Bintangor should the respondent win the election together with the other acts of the respondent and TPK such as, inspection of site and the temporary classrooms, attending the ground-breaking ceremony and promising that classes will start within the year, all point to the corrupt practice of TPK which was to induce the voters to vote for the respondent. The learned election judge dismissed the appellant's contention on the ground that for a promise to be regarded as corrupt practice of bribery within s 10(c) there must be present an element of 'bargaining'. He drew support for his view from the case of *Harjit Singh Mann v S Umrao Singh & Ors* AIR 1980 SC 701 where at p 706 Shinghal J stated:

> It may be mentioned that the trial court rightly took the view that it was necessary for the purpose of proving the corrupt practice of bribery to establish that there was an element of 'bargaining' in what the respondent was alleged to have done for Bara Pind and Littran. Reference in this connection may be made to the decision of this court in *Ghasi Ram v Dal Singh* (1968) 3 SCR 102, where it was held with

reference to the decision in *Amirchand v Surendra Lal Jha* [1954–1955] 10 Ele LR 57 (Ele Tri Nag) that if a Minister redresses the grievances of a class of the public or people of a locality or renders them any help, on the eve of an election, it is not a corrupt practice unless he obtains promises from the voters in return as a condition for his help. It was also held that the evidence must show clearly that the promise or gift directly or indirectly was made to an elector to vote or refrain from voting at an election, and that 'if there was good evidence that the Minister bargained directly or indirectly for votes, the result might have been different'. The decision in *Ghasi Ram*'s case was followed in *Om Prabha Jain v Abnash Chand* (1968) 3 SCR 111, *Bhanu Kumar Shastri 522 and Chaitanya Kumar Adatiya v Smt Sushila Dixit* (1976) 3 SCR 97. It was therefore necessary for the appellant to plead, and to prove that there was bargaining between the respondent and the voters and he did what he is alleged to have done in Bara Pind and Littran for that reason but, as the trial court has pointed out, there was no such allegation in the election petition. So when the element of bargain was completely absent from the allegation against the respondent, the trial court was justified in holding that the alleged corrupt practice had not been established.

[11] We agree with the learned election judge in this regard and would say that even the facts in *Maganlal Bagdi v Hari Vishnu Kamath* (1958) 13 ELR 205, which was relied upon by the appellant clearly shows that there was an element of bargaining. The facts in that case disclosed that the villagers had asked the appellant to construct a well and said they would vote for the Congress candidates if the well was constructed. The appellant then asked the villagers to show him a suitable site. A deposit was paid towards the construction of the well.

[12] It is clear in that case that there was a bargain struck between the villagers and the appellant in that the villagers agreed to vote for the Congress on condition that the appellant constructed a well for them. The outcome of the bargain was that the villagers would get a well and in return the appellant was promised their votes.

[13] In the alternative, learned counsel for the appellant submitted that in the present case there was in fact a 'bargain' as the promise to build Rahman College was not denied by the respondent and that had caused some voters to vote for the respondent. On this we agree with the learned election judge that, those facts alone was not sufficient to constitute a 'bargain'. In order to constitute such a bargain there must be present a promise from the appellant to build Rahman College and a counter promise by the voters to vote for the appellant. Here, there was no evidence of a counter promise by the voters.

[14] In any election the candidate is bound to make promises to bring development to the constituency in which he is standing, this alone in our respectful view could not constitute 'bribery' as used in the Act otherwise the

whole process of election will be meaningless. For how else could a candidate appeal to the electors to vote for him. In *Dhartipakar Madan Lal Agarwal v Shri Rajiv Gandhi* AIR 1987 SC 1577 the Indian Supreme Court stated the position in the following words:

> A candidate, his workers and supporters have every right under the law to canvass for the success of a particular candidate saying that if elected he could work for the development of the constituency. Such a promise does not in any way interfere with the free exercise of electoral right of the electors.

[15] Similarly here, the promise to build the Rahman College is in our view a legitimate promise in the election and that by itself could not constitute any form of bribery under the Act. The promise to bring Rahman College to the constituency made by the respondent together with TPK can be construed as a promise to bring development to the constituency. This will benefit every one in the constituency seeking higher education irrespective of which ever way he or she may have voted in the election. In *Ghasi Ram v Dal Singh* AIR 1968 SC 1191 Hidayatullah J, following *S Mahar Singh v Umrao Singh* AIR 1961 Punj 244, stated that the evidence required to establish corrupt practice under the Representation of the People Act 1951 in the following words, which we think are equally applicable to us:

> In our opinion the law requires that a corrupt practice involving bribery must show clearly that the promise or gift directly or indirectly was made to an elector to vote or refrain from voting at an election.

[16] In that case the money was not distributed to the voters directly but to the Panchayats and the public at large. It was to be used for the good of those for and those against the candidate. There the Supreme Court held that they had the effect of pushing forward the claims of the respondent but that was inevitable even if no money was spent but good administration changed the people's condition. Therefore the court held that there was no corrupt practice. But it said the result would have been different had there been any evidence that the Minister had bargained directly or indirectly for votes.

[17] Having considered the facts in the present case we agree with the conclusion reached by the learned election judge that at the most the promise in this case can amount to a promise of development in the form of setting up of the Rahman College at Bintangor which is a legitimate form of campaigning. In the result we hold that the appellant failed to establish the offence under s 10(c) of the Act as alleged in the petition.

[18] The second ground in support of the appellant's petition is founded on s 32(a) and (c) of the Act. It was alleged that the offence of treating was committed by TPK by holding the luncheon gathering on the 25 February.

It was not disputed that the luncheon was sponsored by TPK for some 500 people. We agree with the learned election judge that to prove treating under s 8 the appellant need to establish beyond reasonable doubt that food was provided with the intention of influencing the voters to vote for a candidate or not to vote a candidate at an election.

[19] The learned election judge found as a fact that there was no such evidence before the court. Quoting from *Schofield's Election Law*, Vol 1, Shaw & Sons, (2nd Ed 1996), which referred to *Tewkesberry Law* (1857) 20 Dig 88,677 it is stated that:

> For to prove treating to be corrupt it is necessary to prove that some person has been thereby corrupted and induced by such treating to vote for the sitting member.

[20] This statement of the law we think is equally applicable to us having regard to the provision of our s 8 of the Act, since there is no such evidence before the court. Therefore, the learned election judge had rightly ruled that the appellant failed to establish the offence of treating under s 8.

[21] As regards the complaint by the appellant on the distribution of Chinese pamphlets promising the construction of Rahman College in Bintangor by certain individual wearing BN badges, this issue depends essentially on how the court perceive the promise by TPK to construct Rahman College. As the learned election judge has ruled and we agree with him that such a promise is not a corrupt act in the circumstances of this case, therefore, it follows that the distribution of the pamphlets is a legitimate form of campaigning and hence no corrupt or illegal practice under s 32(c) was committed by the respondent or his agent.

CONCLUSION

[22] In the result we hold that the appeal is without merit and it is hereby dismissed with costs. Deposit to account of taxed costs.

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed